(3)

No. 03-826

Supreme Court, U.S.
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In The

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will decide if *Desert Palace* should apply to summary judgment proceedings when the Fifth Circuit considered *Desert Palace* and when Petitioner has failed to demonstrate a conflict in the courts on this issue.

2. Whether this Court will decide if *Desert Palace* should apply to ADEA claims when the Fifth Circuit considered *Desert Palace* in its decision on Petitioner's ADEA claim.

3. Whether this Court will decide how to define direct evidence of discrimination when the Fifth Circuit analyzed Petitioner's evidence under the definition she now proposes and when the alleged conflict among lower courts is semantic, not real.

4. Whether this Court will decide Petitioner's contention that the Fifth Circuit ignored *Reeves* despite the Fifth Circuit's specific references to *Reeves* and specific application of its law to Petitioner's evidence.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are Diana Read and BT Alex. Brown, Incorporated.[1] Brown was a predecessor to Deutsche Bank Securities Inc., which is an indirect subsidiary of Deutsche Bank, AG. Deutsche Bank, AG is a banking corporation organized and existing under the laws of the Federal Republic of Germany; its shares are traded on the New York Stock Exchange and throughout the world on other exchanges.

[1] Read's appeal of the District Court's decision was limited to the decision in favor of BT Alex. Brown. To the extent Read now attempts to appeal a decision in favor of any party other than BT Alex. Brown (by listing as the Respondent "Alex. Brown, *et al.*"), her attempt is barred due to her failure to include a reference to such parties in her appeal to the Fifth Circuit.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, B.T. Alex. Brown, respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Nature of the case in the proceedings below

Petitioner accurately states the nature of the case in the proceedings below.

B. Factual background

1. Brown Hires Read.

Diana Read served as an investment broker in Brown's Private Client Division, which provides investment services to corporations and high net worth individuals. During Read's tenure, the Private Client Division maintained a nationwide complement of approximately 400 investment representatives (or brokers), with the Dallas office numbering between approximately 19 and 26. The strategy was to employ a small, and consistently effective, force of brokers whose *production* (i.e., gross commissions earned by the broker for the firm – a key measure of a broker's overall performance) was high or had the potential to become high.

Read had been a high performance broker at Merrill Lynch; in fact, her production placed her in the top 10% of brokers at Merrill Lynch. (2R.APP.021) The year before she left Merrill Lynch, Read had achieved a production level of $560,000 and had $80 million of assets under her management. (2R.APP.021) Merrill Lynch, however, had

terminated her employment in April 1994. (2R.APP.023; 2R.APP.024)

Michael Crossley (then Brown's Dallas office manager) and Jeff Rupp (then Brown's Dallas office sales manager – and the decisionmaker in events to follow, as discussed below) interviewed Read on several occasions. (2R.APP.006; 2R.APP.024; 2R.APP.031) During the interview process, Read informed Crossley of her termination by Merrill Lynch and her contention that Merrill Lynch had discriminated against her on the basis of her age and gender.[2] (2R.APP.026-027) Read also told Rupp about her belief that Merrill Lynch had discriminated against her. (3R.APP.142)

During her interviews, Crossley and Rupp advised Read that the average production of Brown brokers was $500,000 and, at that time, was higher than the average production of other brokerage firms. (2R.APP.037) Read visited Brown's headquarters in Baltimore and met Crossley's boss, Tim Schweizer. Read presented herself as an experienced broker to Crossley and Rupp. (2R.APP.015; 2R.APP.025; 2R.APP.038; 2R.APP.040-043) Crossley wanted to hire Read. (2R.APP.007) Rupp was likewise impressed with Read's performance at Merrill Lynch. (3R.APP.143)

With Rupp's approval, Crossley offered Read a position as a broker. (2R.APP.008; 3R.APP.203) Read accepted Brown's offer. (2R.APP.039) She knew that she was being hired because she was an experienced broker and that she

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[2] Read eventually sued Merrill Lynch for age and gender discrimination. (3R.APP.120-121; 8R.APP.207)

was expected to increase both the volume of her commissions and the volume of assets under management. (2R.APP.015-016) During her 4½ years with Brown, Read never achieved the same level of production she had at Merrill Lynch. (3R.APP.211)

2. Read Begins Work at Brown.

Read began working for Brown in late April 1994. (2R.APP.024) Read knew that Brown would evaluate her based on her production and the assets under her management. (2R.APP.015-018) Read's production goals (established with her agreement), her actual production, assets under her management, and her rank among the Dallas office brokers (based on her production) during her tenure were as follows:

Year	Production Goal[3]	Actual Production	Actual Assets Under Management	Dallas Office Rank[4]
1994	Not Applicable	166,564	14,710,303	17
1995	Not Applicable	288,777	21,940,101	17
1996	500,000	308,595	21,877,480	17
1997	550,000	383,624	28,208,421	17
1998	500,000	304,513	37,937,957	17

(3R.APP.211)

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[3] Production goals are established by the broker. (3R.APP.211; 3R.APP.144)

[4] During Read's tenure, the number of brokers in the office fluctuated between 19 and 26. (3R.APP.211)

During her 4½ years with Brown, Read never achieved the level of production that she had established as a goal for herself. Read received regular feedback regarding her performance; Brown issues monthly production reports stating the broker's production, assets under management, and firm rank, along with other pertinent performance numbers. (3R.APP.211)

Rupp's boss, Tim Schweizer, met annually with the brokers in the Dallas office to communicate information about the business – including a reference to the current "break-even point." (2R.APP.047-049) The break-even point was the amount of production each broker had to generate in order for Brown to make a profit on his or her efforts. If a broker failed to meet the break-even point, Brown lost money on that broker. (2R.APP.049-050) During Read's tenure the break-even point increased from approximately $350,000 to $467,000. (2R.APP.049)

Schweizer's, as well as Brown's, goal had always been to increase the average production per broker. (2R.APP.052) The average production of Brown's brokers nationwide increased from $500,000 to approximately $700,000 annually during Read's tenure. (3R.APP.096) During Read's 4½ years with Brown, Read never achieved the average production level of other brokers. Her highest annual production during her tenure, as demonstrated by the chart above, was $383,624. During individual meetings with Read in 1995, 1996, 1997, and 1998, Schweizer asked Read if she needed any help. (3R.APP.169; 2R.APP.062) Schweizer also told Read during these meetings that he wanted her to achieve the break-even point. (3R.APP.094-095)

From early in her tenure, Read acknowledged that she was not satisfied with her own production. Read and Rupp met at least annually about her performance. (3R.APP.078; 3R.APP.122-123) During these meetings, Read confessed that she knew that she was not as productive as she should be. (3R.APP.122-123) In early 1996, Read admitted to Rupp that she was dissatisfied with her performance. (3R.APP.078) Read, however, blamed her poor performance on her difficulties in transferring clients from Merrill Lynch, which she had left in 1994, and on her lawsuits involving Merrill Lynch. (3R.APP.079; 3R.APP.124) At this early point in her tenure, Rupp indicated that he was not worried about her performance. (3R.APP.078-079)

In 1997, however, Rupp began counseling Read about her performance. Read acknowledged that her attention to business had been distracted:

> I told him that I was glad the lawsuits . . . was [sic] over, that I felt like it had interfered with my time and I would be able to concentrate a little bit better on business. (3R.APP.124)

During this time frame, Read was a litigant in two lawsuits – a sex and age discrimination case that she filed against Merrill Lynch and a securities case that a client filed against Read and Merrill Lynch. (3R.APP.124-125; 2R.APP.044-045; 8R.APP.207)

In early 1998, Schweizer announced in a group meeting and in a separate meeting with Read that each broker needed to reach $400,000 in production. (2R.APP.050-051) He also warned Read that she, too, needed to increase her production. (2R.APP.051)

In September 1998, Read's substandard production became critical. Rupp met with her and explained that she needed to significantly increase her production. (3R.APP.124) Her 1998 production (ultimately less than $300,000 to December 1, 1998) was simply insufficient. (3R.APP.206) Read realized the gravity of the situation – she believed she was in danger of losing her job. (3R.APP.082-083) Rupp asked her how he could help her grow her business. (3R.APP.081.1) Rupp observed that her production at Brown never had reached the levels she achieved while at Merrill Lynch. (3R.APP.084-084.1)

3. Banker's Trust Company Experiences a Severe Financial Crisis.

In late 1998, Brown's parent company at that time, Banker's Trust, experienced a tremendous financial crisis which required immediate and severe cost cutting measures within Banker's Trust and its subsidiaries, including the Brown Private Client Division. (3R.APP.211) Schweizer, the national head of the Private Client Division, instructed each of his branch managers, including Rupp, to reduce his office's expenses immediately. (3R.APP.167; 3R.APP.177; 3R.APP.145)

Rupp determined that he had to reduce the headcount in the office in order to meet the reduction target. Because reducing the number of sales assistants would adversely affect the brokers to whom the sales assistants were assigned and consequently reduce the productivity of the office, Rupp decided to select an unproductive broker for termination. (3R.APP.212)

Rupp then had to decide which broker would be laid off. At this time, the Dallas office of Brown employed the following brokers whose production was low[5]:

Broker	Gender	Age as of Nov. 1998	Years with Securities License	1998 Production through Nov. 1998
Read, Diana	F	54	15	$297,568[6]
Blackmar, Roger	M	67	41	$231,775
High, Chris	M	28	4	$149,181
Villarreal, Lynda	F	28	2	$ 10,786
Palmer, Jaime	M	25	8 months	$ 3,120

Rupp knew that Read, Roger Blackmar, Chris High, Lynda Villarreal, and Jaime Palmer had low production (as reflected in the chart above). Rupp decided to choose the broker to be laid off based on overall performance. (3R.APP.212) While the concept of performance includes production, it also embraces the broker's ability to open new accounts, increase the amount of assets under his or her management, make presentations to potential clients, and locate potential clients. (7R.APP.161-162)

Out of the five brokers, Read's performance was the lowest. High and Villarreal were all new to the business

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[5] All information in the chart is contained in 3R.APP.205-206.

[6] Read's assertion that her 1998 production was $403,296 is misleading. (Pet. 7) Read only reaches this number by defining 1998 as the last quarter of 1997 through the third quarter of 1998. (Pet. 6) It is uncontested that her production from January 1, 1998 through November 1998 was $297,568.

and had the potential to be successful brokers; each had been a broker for less then one year (despite having their license prior to becoming brokers). (3R.APP.212) Palmer was part of a team that had an extremely successful book of business serving clients who resided in Mexico and had only been a broker for less than a year. (3R.APP.212) Blackmar (who was age 67 at the time and had 41 years experience) had strong relationships with many Brown clients and potential clients and was in the process of transitioning these clients and contacts to other Brown brokers. (3R.APP.212)

Read, then, was Rupp's logical business choice for the layoff. Read had never met Brown's expectations. (3R.APP.135.1) When Read came to Brown, she claimed a Merrill Lynch production level of $560,000. (2R.APP.022; 2R.APP.028-029) During her entire tenure at Brown, however, her highest annual production level was $383,624. Read fell below her own expectations; she never even met the production goals she set for herself. In fact, Read always ranked as one of the lowest producers in the office. (3R.APP.205-206)

4. Rupp Meets with Read About the Lay-off.

On or about December 1, 1998, Rupp met with Read. (3R.APP.113) Her production for the first eleven months of 1998 was $297,568. (3R.APP.211) According to Read, the statements by Rupp[7] and by her in this meeting were as follows:

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[7] Read's characterization of this conversation in her Petition as Rupp telling her that her employment was terminated because of her

(Continued on following page)

A: We sat down. The very first thing he said, he said, We're doing some cost cutting and you and I are going to have to part company.

Q: Okay.

A: And I said, Well, if you're doing cost cutting, why would you fire me if I'm bringing in $400,000? And he said, The cutoff is 467 and you're not doing 467 . . .

I'm sure there was some other discussion, but sitting here right now, I cannot remember.

(3R.APP.114)

Read then spoke with Schweizer about the termination:

Q: And you called him and the first thing you said was?

A: . . . I really liked my job and I was going to do over 400,000 this year and why did he see fit to be terminating me, and he said, well, the cutoff's 467.

These conversations make clear that Brown communicated the reason for her termination – cost cutting – to her. These conversations also make clear that Read, not Brown, is the one who asserts that the criterion for the reduction in force was production less than $467,000.

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failure to "meet the cut off of $467,000" is grossly inaccurate, as demonstrated by Read's quoted deposition testimony.

Ultimately, Read's production for the entire year of 1998 was $304,513. (3R.APP.211)

C. District Court proceedings

On January 7, 2002, the District Court granted Brown's summary judgment motion and dismissed Read's claims. The District Court held that a reasonable trier of fact could not find that Brown subjected her to differential terms and conditions of employment based upon her age or sex. (Pet. App. 6sa) The District Court also held that Read failed to show intentional discrimination on the basis of sex or age in the termination of her employment through either direct or indirect evidence of discrimination. Importantly, the District Court considered all of Read's evidence, as a whole, and concluded that Read had *neither* direct *nor* circumstantial evidence of discrimination on *any* of her claims of discrimination. (Pet. App. 18sa)

In addressing Read's claims of having been subjected to "differential terms and conditions" during her employment,[8] the District Court reviewed each of the five acts that Read alleged as constituting differential terms and conditions of employment. (Pet. App. 3sa) In reaching its conclusion, the District Court considered Read's allegations relating to differential terms and conditions of employment, separately and as a whole, and applying appropriate precedent, held that a reasonable trier of fact could not find that Brown intentionally discriminated

[8] The court did not address Brown's claim that these claims are time-barred.

against Read in the terms and conditions of her employment based upon her age or sex, as discussed below (Pet. App. 6sa):

Term and Condition	District Court Reasoning
1. Less sales assistant coverage	No evidence of sex or age discrimination because Read received the same treatment as men over and under age 40. (Pet. App. 4-5sa)
2. Access to training programs	No evidence of sex or age discrimination because Read did not ask for nor was denied the opportunity to attend training programs. (Pet. App. 5sa)
3 & 4. Fewer referrals of and help with corporate clients	No evidence of sex or age discrimination because her evidence that Rupp helped newer brokers was not probative and the only person whom Read identified as receiving corporate clients was a male over age 40. (Pet. App. 5-6sa)
5. Treating younger and male brokers "with more respect"	Rupp's alleged rudeness to her on two occasions was not probative, particularly in light of her testimony that Rupp was also rude to male brokers. (Pet. App. 6sa)

The District Court next addressed whether Read proffered direct evidence of unlawful discrimination. Once again, reviewing these comments in the light most favorable to Read as a summary judgment nonmovant, and specifically applying *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the District Court

concluded that such comments did not constitute direct evidence of discrimination (Pet. App. 10sa):

Alleged comment	**District Court Reasoning**
When brokers get old, they slow down. Jim's old but he's not slow. I'm hoping that even though you are older, you are not going to be slow.	Although the comment was related to age and was made by the decisionmaker, the comment was made in 1995 and thus was not proximate to the 1998 termination decision. (Pet. App. 9sa)
I want to hire a young man out of college who will work real hard.	The comment does not relate to the termination decision because it was about hiring of a sales assistant and (because it was made in 1995) was not proximate to the termination decision. (Pet. App. 9sa)
We have very high standards here; we're like Goldman Sachs.	While the comment was made near the time of termination by the decisionmaker, the only "evidence" that this relates to a protected class is Read's unsupported conclusion that "Goldman Sachs is pretty much known for not hiring women." (Pet. App.9sa-10sa)

The District Court next turned to Read's claim that she offered indirect or circumstantial evidence of discrimination. In doing so, the Court once again examined the issue applying Supreme Court precedent, including *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Reeves*. In doing so, the Court,

quoting *Reeves*, noted that "proof that the Defendant's explanation is unworthy of credence is simply *one form of circumstantial evidence that is probative of intentional discrimination*, and it may be quite persuasive." [Emphasis added.] (Pet. App. 11sa) Applying the facts as alleged by Read against this legal backdrop, the District Court found that the evidence, viewed in the light most favorable to Read, did not raise a genuine issue of material fact regarding pretext or that her age and/or her sex was a "motivating factor in Brown's decision to terminate her." (Pet. App. 17sa-18sa) To reach the conclusion that Read failed to establish a discriminatory motive in the termination, the District Court examined all of the evidence in the case, including, but not limited to, the alleged differential terms and conditions of employment, the alleged comments and the alleged inconsistencies in the reason for termination.[9]

D. Court of Appeals' proceedings

The Fifth Circuit affirmed the decision of the District Court. The Court analyzed Read's Title VII and ADEA claims concurrently since "[t]he same evidentiary procedure for allocating burdens of production and proof applies to discrimination claims under both statutes," (Pet. App. 5a n.9, quoting *Bauer v. Albemarle Corp.*, 169 F.3d 962,

[9] The District Court rejected Read's argument that Brown was inconsistent in its reasons for termination. Read characterized Rupp as having said that she was terminated because her production was less than $467,000. The District Court reviewed the evidence, Read's own deposition testimony, and found Brown's reason for termination to be consistent with Read's testimony. (Pet. App. 15sa)

966 (5th Cir. 1999)). The Fifth Circuit analyzed Read's claims against Supreme Court precedent, including *Reeves* (Pet. App. 4a), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (Pet. App. 5a), and *Desert Palace, Inc. v. Costa*, ___ U.S. ____, 123 S.Ct. 2148 (2003) (Pet. App. 5a).

Analyzing first her differential terms and conditions claim, the Fifth Circuit concluded, applying *Reeves*, that Read failed to raise a genuine factual dispute concerning "the central question of discriminatory animus." (Pet. App. 7a-8a, citing *Reeves*). Consequently, the Fifth Circuit concluded that none of Read's evidence, "taken individually or as a whole," raised a fact issue as to whether Brown treated Read differently because of her age or sex. (Pet. App. 11a)

The Fifth Circuit reached the same conclusion with regard to Read's claims of discriminatory discharge. It found that two of the alleged comments were "patently not direct evidence of discrimination." (Pet. App. 12a), and that the third, "considered in isolation or together with other remarks, [was] simply not meaningfully probative of discriminatory animus in Read's termination" (Pet. App. 14a)

The Fifth Circuit next considered Read's claims of circumstantial evidence of discrimination. The court once again painstakingly walked through each of Read's alleged "incidents" of discrimination and concluded that the "District Court correctly awarded summary judgment to Brown on her claim of discriminatory discharge." (Pet. App. 17a) In doing so, the court specifically found that there was insufficient evidence from which a reasonable jury could conclude that Brown's explanation for her termination was pretextual (citing *Reeves* at 530 U.S. 146)

or that her termination was motivated by animus. (Pet. App. 18a)

In analyzing Read's evidence, the Fifth Circuit specifically addressed Read's arguments concerning the Eleventh Circuit's decision in *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999) (Pet. App. 12a n.13). In doing so, the court found that Read's arguments concerning the definition of direct and circumstantial evidence was of no moment in this case because by any measure, such evidence was neither directly nor circumstantially sufficiently probative of discriminatory intent (i.e., motivation) in respect to Read's termination. (Pet. App. 13a n.13)

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* AND READ FAILS TO DEMONSTRATE A CONFLICT REGARDING *DESERT PALACE*'S IMPACT ON SUMMARY JUDGMENT.

The analysis of and results reached by the District Court and the Fifth Circuit in *Read* are in step with *Desert Palace*. It is elementary that regardless of the convention used to arrive at the destination, the ultimate destination is a determination of whether there is probative evidence of discrimination – that the decision was motivated by statutorily prohibited considerations (in this case, gender and age). Ultimately, both the District Court and Fifth Circuit determined, using the established Supreme Court precedent, that the evidence – taken in a light most favorable to Read – did not support an inference of discrimination under *any analysis*. Thus, whether the standard is direct evidence, circumstantial evidence, pretext,

motivating factor, or otherwise, the courts below have found that Read failed to proffer evidence upon which a reasonable jury could find discriminatory motivation. Consequently, Read's arguments concerning the effect of *Desert Palace* on summary judgment (and as discussed below, its application under the ADEA, the definition of direct evidence, and the application of *Reeves*) become merely an academic exercise, not one that changes the result in this case. Consequently, this Court should deny the petition.

The precise holding of *Desert Palace* was that circumstantial evidence of discrimination may support a mixed motive jury instruction. *Desert Palace*, 123 S.Ct. at 2150 & 2155. Thus, the inquiry under *Desert Palace* follows the following stream of logic:

First, a determination must be made, initially by the judge as gatekeeper and then by the jury, whether there is sufficient evidence of discriminatory motivation; and second, if so, whether the employer would have made the same decision absent the discriminatory motivation. The burden of proof in the first inquiry is on the plaintiff; and on the second, the defendant.

It has long been the law that a plaintiff may prove discrimination through the *McDonnell-Douglas* pretext analysis or through other evidence of discriminatory animus. *Reeves*, 630 U.S. at 146-47. Indeed, Read, herself, acknowledges that the threshold question (even under her suggested application of *Desert Palace*) becomes whether the prohibited characteristic was a motivating factor in the adverse employment action. (Pet. 12) As noted above, the courts below specifically considered Read's summary judgment evidence viewed in the light most favorable to

her, and applying Supreme Court precedent, concluded that there was insufficient evidence for a rational jury to find discriminatory intent.

In any event, Read fails to demonstrate that the circuit courts are split on whether *Desert Palace* applies to summary judgment proceedings and what its impact is. In fact, the only circuit case Read cites expressly declines to reach this issue, although it does note that the result there would be the same because there was no evidence from which a jury could "logically infer that age or gender was a motivating factor in her termination." *Allen v. City of Pocahontas,* 340 F.3d 551, 557 (8th Cir. 2003).

Read's only other evidence of "conflict" among courts consists of district court cases (only one of which allegedly precluded application of *Desert Palace*) and of her own case. *See*, *Davis v. Emery Worldwide Corp.*, 267 F. Supp. 2d 109, 120, n.2 (D. Me. 2003). (Pet. 11) Read claims that the *Davis* court, as a matter of law, refused to apply *Desert Palace* in a summary judgment setting. A closer examination of the case reveals that Read's characterization is inaccurate. The *Davis* court found that the evidence raised "no possibility of a mixed motive," given the defendant's "tacit admission" that pregnancy was the basis for its decision and thus, *Desert Palace* simply did not apply.

II. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* IN ANALYZING READ'S ADEA CLAIM.

The Fifth Circuit applied the "same evidentiary procedure for allocating burdens of production and proof" to Read's Title VII and ADEA discrimination claims. (Pet. App. 5a) This relegates the question in this case of whether *Desert Palace* should apply to her ADEA claims to

a mere academic exercise. As stated earlier, *Desert Palace* teaches that if the employment decision at issue was the subject of improper motive, the jury can receive a mixed motive instruction. Here, the lower courts found that Read, as a matter of law, failed to proffer evidence that would support a finding of improper motive. In doing so, the lower courts negated any need for consideration of whether *Desert Palace* should apply to ADEA cases.

III. THE FIFTH CIRCUIT ANALYZED READ'S "DIRECT EVIDENCE" OF DISCRIMINATION UNDER THE DEFINITION SHE NOW PROPOSES AND NO SPLIT EXISTS AMONG THE COURTS ON THE DEFINITION OF DIRECT EVIDENCE.

Read's discussion on alleged fine distinctions between the Fifth Circuit's definition of direct evidence and the Eleventh Circuit's definition in *Wright* has no relevance in this case because, as the Fifth Circuit explained:

> [T]he result here would clearly be the same even absent the direct/circumstantial evidence distinction (or our court's definition of those terms for this purpose), for the three comments in question, taken together, are simply insufficiently probative of discriminatory intent in respect to Read's December 1998 termination, particularly in light of Brown's undisputed evidence of its nondiscriminatory reason for Read's termination. Nothing in our affirmance here is inconsistent with the result in *Wright*.
>
> (Pet. App. 13a)

Analysis of the alleged conflict in definitions reveals that Read has set up an artificial distinction between the

preponderance and dictionary definitions of direct evidence based upon *Read* and *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995), and *Wright.*[10] The Eleventh Circuit's analysis in *Wright* yields the same substantive result as the Fifth Circuit's analysis in *Read* and *Mooney*. In *Wright*, the Eleventh Circuit attempted to distinguish what it called the dictionary definition of direct evidence (which, the court said, required a direct admission by the decisionmaker that discrimination motivated the decision) from its preferred preponderance definition (namely, "a causal link between an adverse employment action and a protected personal characteristic."). *Wright,* 187 F.3d at 1293. The Eleventh Circuit then embarked upon a detailed analysis of cases and ultimately relied on precisely the same factors isolated by the Fifth Circuit in the four-part *Brown v. CSC Logic, Inc.* test which the Fifth Circuit has adopted in *Auguster* as the correct standard for direct evidence. *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404-05 (5th Cir. 2001); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir 1996). The Eleventh Circuit's analysis was elaborate, but the ultimate destination was the same as *Mooney*. *Wright*, 187 F.3d at 1293. This established jurisprudence is consistent with the concurring opinion of Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (referring to "direct evidence that discriminatory animus played a significant or substantial role in the employment decision"). Consequently, there is no "split" in the circuits as to

[10] That portion of the *Wright* opinion announcing Read's proposed definition of direct evidence is dictum and is not joined by the other two judges on the *Wright* panel. *See Wright,* 187 F.3d at 1306 (Judges Cox and Hall concurring in the judgment and result respectively).

the definition of direct evidence, even if such definition were applicable here.

IV. THE FIFTH CIRCUIT FOLLOWED *REEVES*.

As fully embraced by the Fifth Circuit below, *Reeves* explains that courts analyzing summary judgments "should review all of the evidence in the record" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves* at 530 U.S. 150-51. The Fifth Circuit did so in this case. Read's real complaint is that she disagrees with the Fifth Circuit's application of established law to fact.

Read claims that the Fifth Circuit found the alleged comment about older brokers as not probative of discrimination because of its "vintage" and that such finding conflicts with *Reeves*. There is no such conflict. The Fifth Circuit found that this comment was not probative because it occurred at the beginning of her tenure *and* because she presented evidence of no other similar comments during her four-year tenure.

Read also claims that the Fifth Circuit improperly required her to have "substantial evidence of pretext."[11] Her argument mischaracterizes the Fifth Circuit's opinion only by citing part of it. In this discussion, the Fifth Circuit properly states that "where the plaintiff . . . produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the

[11] Read's argument that Rupp's reference to Oppenheimer constitutes pretext should not be considered because she first made this argument to the District Court in her Motion for Reconsideration, which was properly denied.

defendant is appropriate." (Pet. App. 6a) Consistent with *Reeves*, the Fifth Circuit found that Read failed to present evidence of pretext.

Read also argues that the Fifth Circuit failed to review evidence in the light most favorable to Read. This is simply incorrect. In its opinion, the Fifth Circuit repeatedly acknowledged that it must adhere to the requirement that it view the evidence in the light most favorable to Read, and it did so. Read's real complaint is that the Fifth Circuit failed to accept her "spin" on the evidence. For example, Read claims that the Fifth Circuit "used Brown's version of the facts, cited at page 15 of Brown's brief." (Pet. 27) The referenced evidence on page 15 is not Brown's "version" of the facts; it quotes Read's own testimony. Thus, the Fifth Circuit complied with *Reeves*.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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